

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

AIMEE LAIN)	
Claimant)	
)	
VS.)	
)	
AMAZON.COM.KSDC, INC.)	
Respondent)	Docket No. 1,039,520
)	
AND)	
)	
AMERICAN HOME ASSURANCE CO.)	
AMERICAN ZURICH INSURANCE CO.)	
Insurance Carriers)	

ORDER

Respondent and American Zurich Insurance Co. request review of the April 7, 2009 preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

ISSUES

Aimee Lain filed an application for preliminary hearing claiming her repetitive work activities each and every day worked from October 2007 had aggravated a preexisting low back injury. Lain testified that her back pain gradually returned due to a seasonal increase in her workload and worsened after she suffered a specific incident on January 9, 2008.

Respondent argued that the specific twisting incident at work on January 9, 2008, was an activity of day-to-day living and not a compensable work-related accidental injury.

The Administrative Law Judge (ALJ) found "that the Claimant's description of her January 9, 2008 incident constitute [sic] a work accident, due to the increased workload during the Respondent's peak season and not a personal risk."

Respondent requests review of whether Lain's accidental injury arose out of and in the course of employment with the respondent. Respondent argues that twisting is a normal activity of day-to-day living and Lain did not meet her burden of proof to establish that her work was strenuous or exposed her to additional risk of injury.

Lain argues her work was repetitive and that her work activities subjected her to an increased risk of injury of the type she actually suffered. Consequently, Lain requests the Board to affirm the ALJ's Order.

The sole issue raised on appeal is whether Lain suffered accidental injury arising out of and in the course of her employment with respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Aimee Lain's job in "sortation" required her to bend, pull, twist and grasp items to put on the conveyor belt to be packaged for shipping. The maximum weight was 27 pounds. In September 2006 Lain fell off a step stool and injured her back. Lain was treated and released to return to work with no restrictions. Lain did not seek additional medical treatment for her back between September 2006 and January 2008.

Lain testified she suffered a gradual increase in her back pain due to a seasonal increase in her workload. She testified:

Q. When did you first experience back pain?

A. I had had back pain in 2006 whenever I had fallen and everything. It had kind of gotten better. Over the course of the peak season of 2007 we were putting in a lot more overtime and I was out of the problem solving status, I was more on the floor doing the packaging and the inducting and things of that nature and it just continually got worse.¹

And Lain was already experiencing low back and hip pain before the incident in January 2008. On January 9, 2008, as she was packaging product out of the chutes, she turned to place totes on a table and her right leg went out and she caught herself to keep from falling. After the incident she took personal time and went home. Because her pain persisted she notified the respondent's on site medical staff the next day after the incident. And she informed them that her back felt like it had after her fall in 2006.

She sought medical treatment with her family physician, Dr. Cummings. The doctor took her off work and she is receiving long-term disability benefits. Lain is still having low back pain and numbness radiating down into her right leg to the ankle.

¹ P.H. Trans. at 8.

The ALJ referred Lain to Dr. Paul Stein who performed a physical examination and evaluated claimant on November 4, 2008. The doctor reviewed claimant's medical records and took a history from claimant. Dr. Stein opined in pertinent part:

In my opinion, and within a reasonable degree of medical probability and certainty, there is no causal relationship between the incident in January of 2008 and the soft tissue injury in 2006.

If the report of onset of acute back and right lower extremity pain while turning to put something on a table in January of 2008 is correct, it is likely that this was the time that the L5-S1 disk herniation occurred or at least started to herniate acutely. Whether such a routine act constitutes an injury caused by work is a legal and not a medical question. The medical records on 1/13/08 and 1/15/08 reflect more of a steady onset rather than abrupt episode. I do not know how heavy or repetitive work activity was during the Christmas season to determine if this was a significant contribution to the disk herniation.

The description given by Ms. Lain of repetitive hand activity at work is consistent with development of bilateral carpal tunnel syndrome and she has a mildly positive right Phalen's test. There is no neurological deficit. If EMG/NCT confirms carpal tunnel syndrome, I believe it is more likely than not related to her work activity.²

Respondent argues that Lain has failed to establish that the twisting incident at work on January 9, 2008, was more than a normal activity of day-to-day living.³ This Board Member disagrees.

A causal connection between an injury and employment exists when the injury results from a risk peculiar to the claimant's employment and not from a hazard the claimant would have encountered regardless of employment.⁴ If the employment exposes the worker to an increased risk of injury of the type actually sustained, the employer is liable for compensation.⁵

Lain testified that as her workload increased due to seasonal peak time in the fall of 2007 her back pain gradually worsened. Her testimony alone is sufficient evidence of

² P.H. Trans., Resp. Ex. 1 at 6.

³ K.S.A. 44-508(e)

⁴ *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan.App.2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

⁵ *Angleton v. Starkan, Inc.*, 250 Kan. 711, 828 P.2d 933 (1992).

her own physical condition.⁶ Dr. Stein indicated he did not know how heavy or repetitive Lain's work activity was in order for him to determine whether it was a significant contribution to the disk herniation but he did conclude that the incident on January 9, 2008, likely started or caused her disk herniation. And, interestingly, Dr. Stein did conclude Lain's work activities were repetitive enough to cause bilateral carpal tunnel syndrome.

Simply stated, Lain performed repetitive work that required that she turn or twist to place product on a table. She described her activities as repetitive. Although twisting may be an activity of day-to-day living the frequency that she was required to twist to place product on a table was a peculiar risk of her employment to which she otherwise would not have been exposed.⁷ Furthermore, the statute does not preclude accidents or injuries that are due to the normal activities of day-to-day living, but disabilities. This presumes a personal risk rather than an employment risk. Dr. Stein opined that the twisting incident on January 9, 2008, likely either started or caused the disk herniation. This Board Member finds Lain has met her burden of proof to establish that she suffered accidental injury arising out of and in the course of her employment.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁸ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁹

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Thomas Klein dated April 7, 2009, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July 2009.

DAVID A. SHUFELT
BOARD MEMBER

⁶ *Hanson v. Logan U.S.D.* 326, 28 Kan.App.2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001).

⁷ *Anderson v. Scarlett Auto Interiors*, 31 Kan. App.2d 5, 61 P.3d 81 (2002).

⁸ K.S.A. 44-534a.

⁹ K.S.A. 2008 Supp. 44-555c(k).

c: Kala A. Spigarelli, Attorney for Claimant
Vincent A. Burnett, Attorney for Respondent and its Insurance Carriers
Thomas Klein, Administrative Law Judge